IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No. : 40/2002
Reserved on: : 3.5.2007
Date of decision : 1.6.2007

M/s Madan Lal & Co. & another.

…Petitioner.

Versus

State of H.P. & others. …Respondents

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?[1]*.No.*

For the petitioners : **Mr.J. L. Bhardwaj, Advocate,**

For the respondents : **Mr. M.S. Chandel Advocate General With Mr. M.A Khan and Ms. Meenakashi Sharma, Dy. AG.**

Rajiv Sharma, J. (Oral)

During the course of arguments, Mr. J.L. Bhardwaj, Advocate for the petitioners has confined his submissions only to the issue whether the FDRs of Nalagarh unit can be forfeited for realizing the dues of Solan/Kandaghat unit.

The brief facts necessary for the adjudication of this petition are that the petitioners' company was granted licence for Rs. 3,16,00,000/- for Nalagarh unit for the year 1997-98 on the basis of open auction held on 19.3.1997 at Solan for L14 and L-2 vends.

It appears from the pleadings that the order was passed by the Collector-cum-Assistant Excise and Taxation Commissioner, Solan on 27.5.1998. The petitioners feeling aggrieved by the impugned order dated

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? No.

27.5.1998 preferred an appeal before the Excise and Taxation Commissioner, H.P. on 18.6.2001. The appeal has been rejected by the Excise and Taxation Commissioner, H.P. on 20th October, 2001.

I have heard the parties and perused the record.

Mr. J.L. Bhardwaj, Advocate has strongly urged during the course of arguments that the action of authorities of forfeiting the FDRs of Nalagarh unit for realizing the dues of Solan/Kandaghat is arbitrary and the same is also not in conformity with law. He has further submitted that, if the partners of Solan/Kandaghat unit have committed any breach regarding clearance of licence fee, the same should have been recovered from them as per the provisions of the Punjab Excise Act, 1914.

Mr. M.S. Chandel, learned Advocate General on behalf of respondents-State has relied upon section 25 of the Indian Partnership Act, 1932 and has stated that the petitioners are jointly and severally liable for payment of excise dues. Mr. Chandel has invoked Rules 6 and 9 of the H.P. Liquor Licence Rules, 1986 to fasten the liability on the petitioners. Admittedly, the petitioners have deposited the FDRs for L-14 and L-2 vends which were granted to them in the year 1997-98 for Nalagarh. The amount of FDRs of Nalagarh unit could not be forfeited for realizing the dues of Solan/Kandaghat unit as has been done by the authorities which action has been upheld by the appellate authority on 20.10.2001. For better appreciation of the arguments advanced by the learned Advocate General, section 25 of the Indian Partnership Act, 1932 is reproduced below:

> **"25. Liability of a partner for acts of the firm. - Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner."**

It is evident from the plain reading of section 25 of the Indian Partnership Act, 1932 that the same has wrongly been invoked by the

State for forfeiture of FDRs of Nalagarh unit for realizing the dues of Solan/Kandaghat unit. The bid process which has culminated in grant of licence to the petitioners for the year 1997-98 is to be treated separate licence for Solan/Kandaghat unit. The contention of the learned Advocate General that three partners of Nalagarh/Solan/Kandaghat, namely, Madan Lal, Parveen Kumar and Rajinder Kumar were common and as such the FDRs could be forfeited of the Nalagarh unit for realizing the dues of Solan/Kandaghat unit is legally not tenable. It is specifically averred in para 3 of the writ petition that the petitioners' firm was not registered under Indian Partnership Act.

Similarly, Rules 6 and 9 of H.P. Liquor Licence Rules, 1986 could not be invoked as discussed in the appellate order dated 20th October, 2001 for forfeiting the FDRs of Nalagarh for Solan/Kandaghat unit. Rules 6 and 9 ibid do not visualize that the persons of one unit can be made liable for realizing the dues of second unit. What has been specifically stipulated in Rule 6 is that all the individuals comprising the partnership firm should be specified on the licence and Rule 9 provides that licence granted to partnership or firm is determined by the dissolution of the partnership or firm subject to the liability of the partners jointly and severally for any loss caused to the Government thereby and for the performance of all obligations to Government incurred by the partnership or firm. Rule 9 does not stipulate that the common partners could be made liable for recovering the dues by forfeiting the fixed deposits of one unit vis-à-vis second unit. The respondents have not admittedly resorted to initiate proceedings against the petitioners for recovering the dues of Solan/Kandaghat unit under the provisions of the Punjab Excise Act, 1914. The summary procedure of forfeiting the FDRs of Nalagarh unit for realizing the dues of Solan/Kandaghat unit is not in accordance with law.

The recoveries, if any, are to be effected in accordance with law. The respondents have wrongly invoked section 25 of the Indian Partnership Act, 1932 as well as Rule 9 of the H.P. Liquor Licence Rules, 1986.

It was vehemently urged by the learned Advocate General that the writ petition is not maintainable and the petitioner should have filed a civil suit against the order dated 20.10.2001. The notice was issued by this Court to respondent on 9.1.2002 and the petitioner was admitted for hearing on 2.9.2002. The petitioner at this stage cannot be relegated to file a civil suit for the recovery of the amount. The Hon'ble Supreme Court in ***Union of India etc. Vs. Hariram Shamji Thakkar and others*** 1974 U.J. Unreported Judgments (SC) 652 has held with regard to availability of alternative remedy as under:

> **"Counsel for the Union of India contended that the matter was one which was incapable of being tried in a writ petition by the High Court. He contended in the first instance that a writ petition for the relief claimed was incompetent & the only remedy of the party aggrieved by the order was either to appeal against the order or to file a suit for setting aside the order. In the alternative, counsel contended that even if the writ petition was maintainable, since disputed questions of fact arose in the case for determination, the High Court should not have dealt with the matter on affidavits and should have directed that evidence of the parties and their witnesses be recorded. We are unable to agree with counsel for the Union that a writ petition is not maintainable for the relief claimed by the petitioner. In the present case the Customs authorities had passed an order which was challenged as unauthorized. Prima facie, in respect of such an order a writ may issue if the petitioner satisfies the Court about the truth of his contention. Recourse to the High Court for an appropriate writ is not always barred because the order is capable of being rectified in appeal to the departmental authorities. If there exists an adequate alternative remedy the High Court may leave the party aggrieved to seek relief before the Tribunal of appeal.**

But the rule is not inexorable. Existence of a right of appeal does not bar the jurisdiction of the High Court to entertain a writ petition at the instance of an aggrieved party. If the alternative remedy is onerous or may not be equally efficacious or for other sufficient reason the High Court may examine the validity of acts done by official bodies, alternative remedy notwithstanding. The question is one of discretion and not of jurisdiction. Again in a petition for the issue of a writ under Article 226 of the Constitution, the High Court, where the right to relief depends upon a decision on disputed questions of fact, ordinarily relegates the party aggrieved to agitate the dispute in a civil suit. That is however a rule of practice and not an incident of the jurisdiction of the High Court. In a case in which a plea of infringement of a fundamental right of a party is raised, the High Court may ordinarily enter upon investigation of fact as well as law. Even if the claim to relief is not founded on infringement of a fundamental right, the High Court may in the exercise of its discretion in appropriate cases try disputed questions of fact in determining the right of a party claiming the issue of a high prerogative writ on the ground that a public authority has acted to his prejudice. The Bombay High Court has, in the rules governing the trial of proceedings on its original side, framed rules permitted evidence of witnesses to be recorded in proceedings under Article 226 as in a suit and r. 630 of the Rules states:

> **"If cause be shown or answer upon affidavit putting in issue any material question of fact the Court may allow oral testimony of witnesses to be taken and for that purpose may adjourn the hearing of the rule of some other date. In such a case either party may obtain summonses to witnesses, and the procedure in all other respects shall be similar to that followed in a suit."**

The rule it need hardly be said confers no new jurisdiction: it merely affirms the jurisdiction and prescribes the procedure to be followed in the exercise of that jurisdiction. The High Court may, therefore, at the request of a party direct that a person who has filed an affidavit be called before the Court for cross-

examination before his affidavit may be taken into consideration, or the Court may allow oral testimony of witnesses to be taken for the purpose of determining any material issue of fact. It is common ground that no request was made before K.K. Desai, J, that any of the deponents of affidavits be called before the High Court for cross examination nor was the Court requested to set down the case for trial on evidence viva voce. The parties were willing to have the matter tried on affidavits only. It is now too late to contend that the discretion exercised by the learned Judge to try the matter on affidavits was improperly exercised.

Counsel for the Post Trust adopted the arguments of counsel for the Union and submitted in addition that the claim made by the petitioner was in substance a claim for specific performance of a contract, and it is the normal practice of a High Court, that to enforce the rights and obligations arising out of a breach of contract, the High Court will not entertain a petition under Article 226 of the Constitution, but we relegate the parties to a civil suit. It is rue as held by this Court in Lekhraj Satramdas Lalvani vs Deputy Custodian-cum-Managing Officer and Others (1), that to enforce obligations arising out of a breach of contract, the High Court will not entertain a writ petition. But in the present case the petitioner was not seeking to enforce a contractual obligation. Under the general conditions of the auction when the bid of the petitioner was accepted, he became the owner of the goods. After the bid of the petitioner was accepted, the goods auctioned remained in the custody of the Port Trust for and on behalf of the petitioner. The petitioner was not thereafter seeking to enforce the terms of any contract : he was enforcing his right to the goods on payment of the price. Council for the Port Trust relied upon sections 57 and 58 of the Sale of Goods Act, 1930, and contended that even in a suit where the title to the property has passed, the Court may award damages and may not order delivery of specific goods. But that, in our judgment, is wholly irrelevant. A public authority refusing to deliver goods belonging to a citizen must, if called upon, show some adequate ground for his refusal, and must set up adequate

grounds for his claim that the citizen be driven to a long and costly litigation by filing a suit for the value of the goods or for damages for non delivery. The only ground suggested before us was that the sale of "prime quality goods" was not authorized and was never intended to be made. That contention we have already negatived. Apart from that plea, there is no other ground of justification set up by the Port Trust for refusing to deliver the goods of the petitioner.

Accordingly the writ petition is allowed. The Annexure P-7 dated 20.10.2001 is quashed and set aside. The respondents are directed to refund the amount of FDRs of Nalagarh unit which has been realized for the dues of Solan/Kandaghat unit to the petitioner with interest @ 9% per annum. There shall be no order as to costs.

(Rajiv Sharma), Judge

June 1, 2007
Awasthi